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BIMB MUSYARAKAH SATU SDN BHD

v.

LEE KIK HOOI & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN JC
[SUIT NO: D11 (D6)-22-238-2003]
23 APRIL 2009

C ***CONTRACT:*** *Agreement - Put option agreement - Enforcement - Whether plaintiff entitled to enforce a put option agreement - Whether transfer of shares involved disposition or dissipation of company's property - Companies Act 1965, s. 223 - Whether applicable - Whether put option agreement valid - Whether there was mala fide on plaintiff's part*

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The primary issue that arose for consideration in this suit was whether the plaintiff ('BIMB Musyarakah') was entitled to enforce a put option agreement ('the put option agreement') against the defendants, the existing shareholders of one Integrated Food Systems & Services Asia Pacific Sdn Bhd ('the company') in E respect of 612,500 ordinary shares of the company ('the option shares'). The salient facts of the case were that *vide* a 'Subscription cum Shareholders' Agreement' ('Subscription Agreement') dated 17 October 2001, BIMB Musyarakah agreed, F by way of investment, to subscribe to 612,500 ordinary shares in the company at a price of RM612,500 on the terms set out in the subscription agreement. In consideration of BIMB Musyarakah having invested by subscribing to the shares above, the existing shareholders, namely the defendants, agreed to grant a put option G to BIMB Musyakarah *vide* a put option agreement. Under the terms of the put option agreement, BIMB Musyakarah could call on the put option in the event of the occurrence of an event of default, which was defined in the Subscription cum Shareholders Agreement. On 17 September 2002, a receiver and manager was H appointed to oversee the affairs of the company and this amounted to an event of default under the said Subscription and Shareholders' Agreement. *Vide* written notices, BIMB Musyakarah officially notified the shareholders of the company that an event of default had occurred and that as such it was giving the I shareholders notice to purchase 612,500 ordinary shares in the

company at the option price of RM696,320.21. The shareholders were given a period of one month to comply by purchasing the option shares. Prior to these events however on 18 July 2002 a winding up petition had been presented against the company by one Ultimate Circle Sdn Bhd. An order was granted winding up the company subsequently on 12 December 2002. It was in the context of this factual matrix that the second defendant contended that as the effective date of winding up was 18 July 2002, the exercise of the put option agreement occurred after winding up commenced and therefore was void by reason of s. 223 of the Companies Act. The issues that arose were (i) whether BIMB Musyakarah could enforce the put option agreement against the defendant shareholders when the company had been wound up and the date of commencement of winding up *ie*, 18 July 2002 preceded the date of exercise of the put option agreement *ie*, 21 November 2002 and would the exercise of the put option agreement amount to a contravention of s. 223 of the Companies Act 1965; (ii) as of the date of the put option agreement on 17 December 2001 BIMB Musyakarah had not effectively subscribed to the shares and therefore the shares did not belong to it and as such the put option agreement was not valid as it would be impossible for the second defendant to buy the shares from BIMB Musyakarah when the shares did not belong to it; (iii) the winding up of the company was contributed to by BIMB Musyakarah through its representative and whether there was '*mala fide*' on the part of the plaintiff.

Held (granting plaintiff judgment against the second, third and fifth defendants):

(1) Section 223 of the Companies Act 1965 serves to prohibit the improper alienation and dissipation of the property of, or belonging to a company made between the time when a winding up petition was presented and the order for winding up was made, unless the court otherwise orders. Herein, it was BIMB Musyakarah that sought to enforce a put option agreement. BIMB Musyakarah sought to make, *inter alia*, the second defendant purchase the shares it owned in the company at the option price. Therefore, it was not the company's property that was the subject matter of the purchase and thereby disposition, but the property of BIMB Musyakarah. In short, BIMB Musyakarah was seeking to

A enforce its right to sell to the shareholders of the company its shares, at a price which was agreed upon in the put option agreement. Further, the option shares comprising the subject matter of the put option agreement between BIMB Musyakarah and the defendant shareholders were not 'free assets to which
B the company was beneficially entitled and which are capable of being realized for the benefit of its creditors.' The transfer of shares here did not entail or involve the disposition or dissipation of the company's property. As such s. 223 of the Companies Act 1965 was not applicable. (paras 17, 18, 22 &
C 24)

(2) Clear factual evidence of PW1 and PW2 as well as the documentary evidence which showed not only that payment was made for the shares in the sum of RM612,500 but that
D the option shares were duly allotted to BIMB Musyakarah and the share certificate evidenced BIMB Musyakarah's ownership of the option shares. The ancillary contention to this issue was that as the payment for the subscription to the 612,500 shares was made on 2 November 2001, some sixteen days
E rather than the fourteen days after the execution of the Subscription cum Shareholders' agreement and the put option agreement, there was a delay which in some way invalidated the put option agreement. There was no objection to the two day delay and parties proceeded to issue the shares to BIMB
F Musyakarah, as well as accept and utilise the monies invested by BIMB Musyakarah. The delay was therefore waived. It did not have the effect of invalidating the put option agreement in any manner. Accordingly, this contention was entirely without merit. (paras 26 & 27)

G **(3)** In the course of cross examination, the second defendant conceded that it was not the duty of BIMB Musyakarah to 'save' the company. He also agreed that attempts had been made by BIMB Musyakarah to assist the company to sell the
H shares to a third party. However, these attempts proved unsuccessful. Taken as a whole, this evidence was far from satisfactory to demonstrate any element of *mala fides* on the part of BIMB Musyakarah. Again, this contention failed. There was no reason why BIMB Musyakarah should not enforce the
I put option agreement which was entered into by it with the shareholders of the company as an integral part of its investment in the company. (paras 29 & 30)

Case(s) referred to:
Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 HC ***(dist)***
Kok Fook Sang v. Juta Villa (M) Sdn Bhd & Ors [1996] 2 BLJ 256 HC ***(refd)***
Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 ***(refd)***
Nadaraja Muthu & Ors v. Palanisamy Ramasamy [2003] 8 CLJ 403 HC ***(refd)***
Re Fench's Wine Bar Ltd [1987] Butterworth Company Law Cases 499 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 223
Insolvency Act 1986, s. 522

Companies Act 1948 [UK], s. 227

For the plaintiff - Ahmad Tarmizi (Mohd Shukri Senafi with him); M/s Tarmizi Marzuki & Sulaiman
For the defendant - K Periasamy; M/s Peri & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JC:

Introduction

[1] The primary issue that arises for consideration in this suit is whether the plaintiff ('BIMB Musyarakah') is entitled to enforce a Put Option Agreement dated 17 October 2001 ('the Put Option Agreement') against the defendants, the existing shareholders of one Integrated Food Systems & Services Asia Pacific Sdn. Bhd. ('the company') in respect of 612,500 ordinary shares of the company ('the option shares') as of 21 November 2002, given that winding-up proceedings were commenced against the company on 18 July 2002 and that the company was wound-up on 12 December 2002.

In essence it is contended for the defendant shareholders that the Put Option Agreement cannot be enforced as it would amount to a contravention of s. 223 of the Companies Act 1965. Section 223 of the Companies Act provides as follows:

A ... shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[2] BIMB Musyarakah seeks an order of specific performance against the second, third and fifth defendants to purchase and pay B to it that portion of the sum of RM696,320.21 as they are respectively liable for, where RM696,320.21 is the total option price for the re-purchase of all 612,500 ordinary shares held by BIMB Musyarakah in the company. BIMB Musyarakah also seeks the sanction of this court to effect the transfer of the subject C shares to the respective defendants. Alternatively it seeks damages for breach of contract by the defendants.

The Defendants At Trial

D **[3]** At the trial of this action, only the second defendant Choong Kooi Kong appeared to defend the claim. The plaintiff advised the court that it is not proceeding against the first and fourth defendants. The third and fifth defendants did not appear in court at trial and their solicitors Messrs. Tunku Farik & Wong E had discharged themselves prior to the date of trial.

It is relevant to note that the total number of shares held by the five shareholders was 2,310,000 shares and that the second defendant held 4.90% or 120,000 shares in the company, the F third defendant, 24.5% or 600,000 shares in the company and the fifth defendant, 12.24% or 300,00 shares in the company.

Salient Facts Of The Case

[4] *Vide* a "Subscription Cum Shareholders' Agreement" G ('Subscription Agreement') dated 17 October 2001, BIMB Musyarakah agreed, by way of investment, to subscribe to 612,500 ordinary shares in the company at a price of RM612,500, on the terms set out in the Subscription Agreement. As stated by Nor Idzam bin Ya'akub, PW1, BIMB Musyarakah's first witness H ('PW1'), who had previously held the position of director, BIMB Musyarakah is a venture capital company that invests in specific companies in anticipation of such companies being listed on Bursa Malaysia, (see exh. P7 at p. 49 of the agreed bundle of documents).

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In addition to these 612,500 shares in the company, BIMB Musyarakah also invested in the 'marketing' arm of the company by subscribing to 30,000 shares at a cost of RM30,000 and by offering a Murabahah Convertible Redeemable Instrument ('MCRI') to the company at a total value of RM2,357,500 on terms set out in another agreement ('MCRI Agreement'). A B

[5] In consideration of BIMB Musyarakah having invested by subscribing to the shares as set out above, the existing shareholders, namely the defendants, agreed to grant a put option to BIMB Musyarakah *vide* a Put Option Agreement. It is this Put Option Agreement dated 17 October 2001 that comprises the subject matter of this action, namely its enforceability, in the light of winding-up proceedings having been commenced against the company, prior to the call on the put option having been made against the defendant shareholders. C D

[6] *Vide* the Put Option Agreement also dated 17 October 2001 (see exh. P2 at pp. 35 to 46 of the agreed bundle of documents), the existing shareholders, ie, the defendants granted to BIMB Musyarakah the right to require the existing shareholders to purchase the 612,500 option shares from it upon exercise of the option by BIMB Musyarakah. Upon such exercise the shareholders became bound to purchase those option shares. Under the terms of the Put Option Agreement, BIMB Musyarakah could call on the put option in the event of the occurrence of an event of default, which is defined in the subscription cum shareholders agreement of the same date. E F

[7] Clause 9 of the subscription cum shareholders' agreement provides that upon the occurrence of any one of the sixteen events of default as enumerated there, BIMB Musyarakah has the option to sell its block of option shares to the shareholders at the cost paid by it plus 15% holding costs per annum for the duration of the investment. One of the events of default expressly stipulated is that where a receiver or manager is appointed in respect of the company's undertaking or property or any part of it by any bank, financial institution or any other person, (see exh. P1 at pp. 22 and 23 of the agreed bundle of documents). G H I

[8] Both PW1 and Rashidin bin Jamani the Director of Corporate Affairs and Investment in BIMB Musyarakah, PW2 ('PW2') testified that as of 2 November 2001, BIMB Musyarakah had fully paid for the subscription of the 612,500 ordinary shares in the company as termed in the subscription agreement, (see exh. P3 at p 47 of the agreed bundle of documents comprising a letter presenting *inter alia*, a cheque in the sum of RM612,500).

[9] On 17 September 2002, less than a year later, a receiver and manager was appointed to oversee the affairs of the company. This amounted to an event of default under subscription and shareholders' agreement and thereby under the Put Option Agreement entitling BIMB Musyarakah to exercise its rights under the Put Option Agreement. Clause 3 of the Put Option agreement provides that upon the occurrence of an event of default the put option may be exercised by serving written notices to the shareholders. SP2 gave evidence that written notices were issued to the shareholders on 21 November 2002.

[10] Although the actual notice issued to the second defendant was not exhibited by BIMB Musyarakah, they did exhibit other notices sent to the third and fifth defendants. They did however exhibit the notification of posting of these notices by registered post to all the defendants, including the second defendant in exh. P9 (at p. 58 of the agreed bundle of documents). The second defendant's solicitors confirmed that they were not disputing that the notice was in fact sent to the second defendant.

[11] *Vide* these notices, BIMB Musyarakah officially notified the shareholders of the company that an event of default had occurred as of 17 September 2002 and that as such it was giving the shareholders notice to purchase the 612,500 ordinary shares in the company at the option price of RM696,320.21. The shareholders were given a period of one month to comply by purchasing the option shares.

[12] Prior to these events however, on 18 July 2002 a winding up petition had been presented against the company by one Ultimate Circle Sdn. Bhd. An order was granted winding up the company subsequently on 12 December 2002 (see exh. P5 at p. 59 of the agreed bundle of documents).

[13] It is in the context of this factual matrix that the second defendant contends that as the effective date of winding-up was 18 July 2002, the exercise of the Put Option Agreement occurred after winding-up commenced and therefore is void by reason of s. 223 of the Companies Act.

Issues

[14] The issues that fall to be considered are as follows:

(i) Can BIMB Musyarakah enforce the Put Option Agreement against the defendant shareholders when the company has been wound up and the date of commencement of winding-up, ie, 18 July 2002 precedes the date of exercise of the Put Option Agreement, ie, 21 November 2002?

(ii) Would the exercise of the Put Option Agreement amount to a contravention of s. 223 of the Companies Act?

(iii) As of the date of the Put Option Agreement on 17 October 2001 BIMB Musyarakah had not effectively subscribed to the shares and therefore the shares did not belong to it. As such the Put Option Agreement is not valid as it would be impossible for the second defendant to buy the shares from BIMB Musyarakah when the shares do not belong to it.

(iv) The winding up of the company was contributed to by BIMB Musyarakah through its representative and there was *"mala fide"* on the part of the plaintiff.

These issues will be considered in turn.

Issue (i) And (ii):

Whether Or Not The Put Option Agreement Can Be Enforced Given That The Company Was Wound Up?

Would The Exercise Of The Put Option Agreement Amount To A Contravention Of s. 223 Of The Companies Act?

[15] These two issues fall to be considered together. The second defendant's contention is that in view of the provisions of s. 223, the purported disposition of the shares of the company *vide* the Put Option Agreement is void as winding up proceedings had already commenced against the company and accordingly, no

A disposition of the shares of the company could be effected without the sanction of the court. In support of this contention, learned counsel for the second defendant, Mr. Periasamy relies on *Lian Keow Sdn. Bhd. (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn. Bhd. & Ors* [1988] 1 LNS 44 where the Supreme Court B had occasion to consider whether the transfer of three portions of land of a company in liquidation to a licensed finance company controlled by one Amos William Dawe was void, *inter alia*, by reason of s. 223 of the Companies Act 1965. In that case, the three dispositions of land were registered after the presentation of C a winding up petition by the court and were therefore void under s. 223. The issue before the Supreme Court was whether the learned judge in the High Court had exercised his jurisdiction correctly in validating the said transfers. In considering this issue, Seah SCJ had occasion to consider the purpose and effect of D s. 223 of the Companies Act by considering the corresponding section in the English Companies Act 1948, namely s. 227. This is what His Lordship said:

> *In re Wiltshire Iron Company* [1868] 3 Ch App 443, Lord Cairns E LJ speaking of the general purpose of section 153 (the forerunner of section 227) of the English Companies Act 1862, said at page 446:
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> > The 153rd section no doubt provides that all dispositions of the property and effects of the company made between F the commencement of winding up (that is the presentation of the petition) and the order for winding up shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in G extremis. But where a company actually trading, which it is in the interest of everyone to preserve, and ultimately to sell, as a going concern, is made the object of a winding up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its H current trade, *bona fide* entered into and completed would be avoided, and would not in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would, *ipso facto*, paralyse the trade of the company and great injury, without any counterbalance of advantage, I would be done to those interested in the assets of the company.

[16] This then summarises the true purport and intention of the section. Further on in the judgment in relation to validation, Seah SCJ went on to cite another English authority:

> Dealing with the phrase "unless the court otherwise orders" in section 227 of the Companies Act 1948 in *Re Steane's (Bournemouth) Ltd.* [1950] 1 All ER 21, Vaisey J said:
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> > The legislature, by omitting to indicate any particular principles which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion.

[17] It is evident from the foregoing passages that s. 223 serves to prohibit the improper alienation and dissipation of the property of, or belonging to a company made between the time when a winding-up petition is presented and the order for winding up is made, unless the court otherwise orders. This begs the question, what is the property of the company in the instant case that is sought to be transferred? In the instant case, it is BIMB Musyarakah that seeks to enforce a Put Option Agreement, ie, BIMB Musyarakah seeks to force the defendant shareholders to purchase its shares in the company. In other words, BIMB Musyarakah seeks to make, *inter alia*, the second defendant purchase the shares it owns in the company at the option price. It therefore becomes apparent that it is not the company's property that is the subject matter of the purchase and thereby disposition, but the property of BIMB Musyarakah. The property of BIMB Musyarakah comprises 612,500 shares in the company.

[18] In short BIMB Musyarakah is seeking to enforce its right to sell to the shareholders of the company its shares, at a price which was agreed upon in the Put Option Agreement. If it is not the property of the company, but the property of BIMB Musyarakah that is sought to be sold, then it would appear that s. 223 of the Companies Act does not come into play.

[19] It is also relevant to keep in mind that the Put Option Agreement was entered into *bona fide*, in the course of BIMB Musyarakah investing its monies in the company. The Put Option Agreement served as a security for BIMB Musyarakah to recoup part of its investment in the company.

[20] Another case cited in support of the second defendant's contention is *Kimoyama Elektrik (M) Sdn. Bhd. v. Metrobilt Construction Sdn. Bhd.* [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 where monies were paid by the company in liquidation to one supporting creditor and a piece of land transferred to another creditor were held to be dispositions of the property of the company after a winding up petition had been presented and were therefore contrary to s. 223 of the Companies Act and held to be void. Again the case is in stark distinction to the instant case where there has been no disposition of any property belonging to the company. The property sought to be sold belongs to BIMB Musyarakah and enforcement is sought against the shareholders of the company, rather than the company itself. This case does not support the second defendant's contention.

[21] Finally the case of *Kok Fook Sang v. Juta Villa (M) Sdn. Bhd. & 2 Ors.* [1996] 2 BLJ 256 is cited by the second defendant. However this case, like the cases above confirms the position that where commencement of winding-up has occurred the disposition of the company's property will be void unless otherwise ordered by court. Here too the issue related to payments sought to be made by the company in liquidation in the course of its day to day business. In the course of his judgment His Lordship Kang Hwee Gee, J considered whether the payments in that case fell within the definition of 'dispositions of property' within the ambit of s. 223. The learned judge relied on the decision of Vinelott J in *Re Fench's Wine Bar Ltd* [1987] Butterworth Company Law Cases 499 where he held that where a company has entered into an unconditional contract for the sale of its property which was specifically enforceable before the presentation of a winding up petition, then the completion of the contract according to its term would not constitute a disposition within the meaning of s. 522 of the Insolvency Act 1986 (formerly s. 227 of the Companies Act 1949). The words 'disposition of property' in his view meant the disposition of free assets to which the company is beneficially entitled and which are capable of being realized for the benefit of its creditors.

[22] Again it becomes apparent that the option shares comprising the subject matter of the Put Option Agreement between BIMB Musyarakah and the defendant shareholders are not 'free assets to which the company is beneficially entitled and which are capable

of being realized for the benefit of its creditors.' Again it is demonstrated that s. 223 is simply not applicable to the transaction in the instant case.

[23] An instructive case on point is *Nadaraja a/l Muthu & Ors. v. Palanisamy a/l Ramasamy* [2003] 8 CLJ 403 where the plaintiff obtained judgment against the defendant in the sum of RM4 million and took out an application for charging orders in respect of shares held by the defendant in one Biografik (M) Sdn. Bhd. A charging order was granted despite opposition from the defendant. When the plaintiff applied to execute the judgments, the defendant opposed the application on the grounds that the plaintiff's application would amount to a violation of s. 223. In allowing the plaintiff's application, Vincent Ng J (as His Lordship then was) held as follows:

> ... Despite the defendant's attempt to blur the distinction between the company and its shareholders, it is trite law that the shareholder of a company is a distinct and separate legal entity from the company in which he holds shares (see *Abdul Aziz bin Atan & 87 Ors v. Ladang Rengo Malay Estates Sdn. Bhd.* [1985] 1 CLJ 255; [1985] CLJ (Rep) 370).
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> The plaintiff's application is for recovery of two money judgments against a defendant by means of charges against his personal property, which although is in the form of company shares, has nothing to do with the company itself. In other words, the plaintiffs are the creditors of the shareholder, not the company.
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> It is also trite law that section 223 of the Act applies to creditors of the company and its true purpose is to protect the property of the company for equal distribution amongst the unsecured creditors of the company in question. The true intention of the section is to safeguard the company's property and not that of its individual shareholders. In my considered view, the sole test to determine whether execution of the charging order in the instant case is caught within section 223, is to ask whether such execution would affect the property of the company through effecting improper alienation or dissipation of its property. Thus I would hold that the words, 'disposition of the property of the company' ought logically to be read conjunctively with the phrase and any transfer of shares or alteration in the status of the members of the company in section 223. It would follow that transfer of shares which do not entail or involve disposition or dissipation of the company's property do not come within the purview of section 223 ...

[24] Applying the foregoing to the instant case, it becomes immediately clear that the transfer of shares here does not entail or involve the disposition or dissipation of the company's property. As such s. 223 is simply not applicable. The shares in the instant case belonging to BIMB should be shares belonging to the company, and not the option shares.

Issue (iii): As Of The Date Of The Put Option Agreement On 17 October 2001 BIMB Musyarakah Had Not Effectively Subscribed To The Shares And Therefore The Shares Did Not Belong To It. As Such The Put Option Agreement Is Not Valid As It Would Be Impossible For The Second Defendant To Buy The Shares From BIMB Musyarakah When The Shares Do Not Belong To It

[25] The second defendant essentially contends here that as the sum of RM612,500 was not paid by BIMB Musyarakah on 17 October 2001, the put option shares do not belong to it and therefore the Put Option Agreement is not valid, as logically, BIMB Musyarakah cannot sell shares when it does not own them.

[26] This contention ignores the clear factual evidence of PW1, PW2 as well as the documentary evidence in exhs P3 (at p. 47 of the agreed bundle) and exhs. P6 and P7 (at pp. 48 and 49 of the agreed bundle) which show not only that payment was made for the shares in the sum of RM612,500 but that the option shares were duly allotted to BIMB Musyarakah as of 8 November 2003 and the share certificate No. 035 evidences BIMB Musyarakah's ownership of the option shares. And when the second defendant was cross-examined, he agreed that BIMB Musyarakah is the owner of the 612,500 shares in the company.

[27] In any event the Put Option Agreement does not envisage that the RM612,500 be fully paid on the date of the agreement. It is evident from a reading of the entirety of the agreement that it envisages that BIMB Musyarakah 'shall' invest by subscribing to the said shares. The ancillary contention to this issue was that as the payment for the subscription to the 612,500 shares was made on 2 November 2001, some sixteen days rather than fourteen days after the execution of the Subscription cum Shareholder's Agreement and the Put Option Agreement, there was a delay which in some way invalidated the Put Option Agreement. There

was no objection to the two day delay and parties proceeded to issue the shares to BIMB Musyarakah, as well as accept and utilize the monies invested by BIMB Musyarakah. The delay was therefore waived. It did not have the effect of invalidating the Put Option Agreement in any manner. Accordingly this contention is entirely without merit.

Issue (iv): The Winding Up Of The Company Was Contributed To By BIMB Musyarakah Through Its Representative And There Was *"Mala Fide"* On The Part Of BIMB Musyarakah

[28] The second defendant's complaint is that BIMB Musyarakah, having invested a substantive sum of money in the company, should have kept a more 'watchful' eye on its investment and upon a winding up petition having been presented, should have attempted to have the debt resolved as it only amounted, in his recollection, to RM40,000. BIMB Musyarakah had a representative on the board of the company and ought to have resolved the debt given their large shareholding. However the second defendant complains that nothing was done resulting in the company being wound-up.

[29] In the course of cross-examination the second defendant however conceded that it was not the duty of BIMB Musyarakah to 'save' the company. He also agreed that attempts had been made by BIMB Musyarakah to assist the company to sell the shares to a third party. However these attempts proved unsuccessful. Taken as a whole, this evidence was far from satisfactory to demonstrate any element of *mala fides* on the part of BIMB Musyarakah. Again this contention fails.

[30] Having considered the totality of the evidence it appears to this court that there is no reason why BIMB Musyarakah should not enforce the Put Option Agreement dated 17 October 2001 which was entered into by it with the shareholders of the company as an integral part of its investment in the company. As stated at the outset, the primary issue raised by the second defendant was a contravention of s. 223 of the Companies Act. As reasoned above, the section is inapplicable in the circumstances of this case, as the shares sought to be disposed of, are not shares belonging to the company in liquidation. They are shares

A in the company belonging to BIMB Musyarakah. Accordingly the plaintiff is granted judgment in terms of prayer (i) of the statement of claim against the second, third and fifth defendants. The costs of the action are to be borne by the second defendant.

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